**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| **STATE OF WASHINGTON,** | ) | **No. 24427-0-III** |
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| **Respondent,** | ) | |
| | ) | |
| **v.** | ) | **Division Three** |
| | ) | |
| **JEFFREY DALE WHITE,** | ) | |
| | ) | |
| **Appellant.** | ) | **UNPUBLISHED OPINION** |

**KATO, J.—**Jeffrey Dale White appeals his conviction of cocaine possession. He argues the evidence was insufficient to prove he constructively possessed cocaine and the trial court denied him the right of allocution at sentencing. We affirm.

On November 11, 2004, Spokane County Deputy Jeff Thurman stopped a black truck near the corner of Sprague and Sullivan. Earlier in the evening, he had seen the truck crossing the double yellow center line on Sullivan and noticed the truck had no rear license plate light. The driver of the truck was Joseph R. Barnes and Mr. White was the passenger.

While checking Mr. Barnes' license, Deputy Thurman learned there was a

warrant for his arrest. The deputy immediately arrested Mr. Barnes and took him into custody. He then asked Mr. White to step out of the truck while he searched the vehicle.

The search of the truck uncovered two plastic bags of white powder. Both bags were found under the floor mat on the front passenger side of the truck. A field test identified the white powder as cocaine. After completing the field test, Deputy Thurman asked Mr. White if he knew about the cocaine. He said he knew about the bags, but did not know they contained cocaine. After these initial questions, Deputy Thurman read Mr. White his *Miranda*[1] rights. He waived his rights so Deputy Thurman continued questioning him.

Although he saw Mr. Barnes with the bags earlier in the day, Mr. White did not know how they got under the floor mat. He also said he did not use cocaine. But Mr. White later admitted to using cocaine, after Deputy Thurman asked for a urine sample. The deputy arrested Mr. White.

On January 31, 2005, the State charged Mr. White with possession of methamphetamine. On February 14, the charge was amended to possession of cocaine. Mr. White was convicted of cocaine possession after a bench trial. This

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

appeal follows.

Mr. White contends the evidence was insufficient to establish he constructively possessed cocaine. On a challenge to sufficiency of the evidence, the evidence is viewed in a light most favorable to the prosecution. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). The appellate court defers to the trier of fact in resolving conflicting testimony and evaluating evidentiary persuasiveness. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). Reasonable inferences are drawn in the State's favor and interpreted against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

Viewing the evidence in this light, the court determines whether a rational trier of fact could find the elements of the crime beyond a reasonable doubt. *Green*, 94 Wn.2d at 220-22. This standard applies to both bench and jury trials. *See State v. Little*, 116 Wn.2d 488, 491, 806 P.2d 749 (1991).

Possession of a controlled substance can be either actual or constructive. *Partin*, 88 Wn.2d at 905. Whereas actual possession requires physical custody, constructive possession requires dominion and control. *State v. Summers,* 45 Wn. App. 761, 763, 728 P.2d 613 (1986). Here, Mr. White was not in actual possession of cocaine. He was sitting above the floor mat where Deputy

Thurman found cocaine. Thus, the question is whether Mr. White's close proximity to the cocaine, along with his answers to Deputy Thurman's inquiries, was sufficient to establish constructive possession.

Establishing constructive possession requires examination of the "'totality of the situation.'" *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004)(quoting *Partin*, 88 Wn.2d at 906). The situation must provide substantial evidence for a fact finder to reasonably infer the defendant had dominion and control. *Id.* Dominion and control means the item can be immediately taken into actual possession. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Control does not need to be exclusive, but mere proximity to contraband is insufficient. *State v. Davis*, 117 Wn. App. 702, 708-09, 72 P.3d 1134 (2003), *review denied*, 151 Wn.2d 1007 (2004).

Mr. White relies primarily on *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969), and *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990). In *Callahan*, a defendant was found in a houseboat sitting next to a box of drugs. *Callahan*, 77 Wn.2d at 28-29. The court determined the defendant did not have dominion and control of the drugs because a codefendant claimed ownership of the drugs. *Id.* at 31. The codefendant had not sold or given the drugs to anyone. *Id.* Thus, the

circumstances did not show constructive possession. *Id.*

Unlike *Callahan*, neither Mr. White nor Mr. Barnes claimed ownership of the cocaine. Instead, both claimed the cocaine belonged to the other. The evidence placed exclusive possession in neither. But the cocaine was found under Mr. White's seat. He knew the bags were in the truck. He acknowledged using cocaine. The totality of the situation was sufficient to establish constructive possession because Mr. White had dominion and control of the evidence.

In *Spruell*, a defendant was found in a house containing drugs. *Spruell*, 57 Wn. App. at 387-88. The court determined the defendant did not have dominion and control of the drugs because no evidence connected the defendant to either the house or the cocaine. *Id.* at 388.

Unlike *Spruell*, Mr. White was connected to both the truck and the cocaine. The truck belonged to his friend, Mr. Barnes, who had bought the truck from Mr. White's father. Mr. White knew the bags were in the truck because he had seen Mr. Barnes with the bags earlier in the day. *Spruell* is distinguishable and the circumstances here sufficiently prove constructive possession.

At trial, Mr. White denied seeing the bags or knowing the bags were in the truck. The court found he was not credible and determined Mr. White "knew the

baggies were inside the vehicle" and "he saw co-defendant Barnes with them earlier in the day." Clerk's Papers at 7. Its credibility determination will not be disturbed. *See State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

Based on this evidence and the totality of the situation, the court could reasonably infer Mr. White had dominion and control over the cocaine. It determined he knew the bags were in the truck because he had seen Mr. Barnes with them. Furthermore, the bags were found under Mr. White's seat and he admitted being a cocaine user. Sufficient evidence exists to prove he constructively possessed cocaine.

Mr. White contends the court improperly denied him the right of allocution at sentencing. Washington provides defendants with a statutory right to allocution. *See* RCW 9.94A.500. This right is derived from federal common law. *In re Pers. Restraint of Echeverria*, 141 Wn.2d 323, 332, 6 P.3d 573 (2000).

Under RCW 9.94A.500, the court is required to "allow arguments from . . . the offender . . . as to the sentence to be imposed." Allocution provides a defendant the opportunity to express remorse and to ask for mercy from the court. *State v. Lord*, 117 Wn.2d 829, 897, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). Mr. White did not give a statement prior to sentencing. The record

shows the court did not ask him if he wished to make a statement. Therefore, the question is whether the court erred by not doing so.

Failure by the court to ask for a defendant's allocution is legal error. *See Echeverria*, 141 Wn.2d at 336. Yet, the right to allocution is not a federal or state constitutional right. *Id.* Errors raised for the first time on appeal must affect a constitutional right and be manifest. *See* RAP 2.5(a)(3); *State v. Hughes*, 154 Wn.2d 118, 153, 110 P.3d 192 (2005). Otherwise, the appellate court may refuse to review the error. *Id.*

Neither Mr. White nor his counsel requested allocution at sentencing. They did not object when the court failed to ask for allocution. Mr. White cannot claim for the first time on appeal that his right to allocution was denied.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kato, J.

WE CONCUR:

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Sweeney, C.J.

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Brown, J.